Nos. 93-70 & 93-108

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., and
GILLIAM COUNTY, OREGON,
Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON,
Respondents.

COLUMBIA RESOURCE COMPANY, L.P.,
Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENTS

THEODORE R. KULONGOSKI
Attorney General of Oregon

THOMAS A. BALMER
Deputy Attorney General

VIRGINIA L. LINDER *
Solicitor General

MICHAEL D. REYNOLDS
Assistant Solicitor General

400 Justice Building
Salem, Oregon 97310
(503) 378-4402

* Counsel of Record

Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether a state disposal fee on out-of-state waste violates the Commerce Clause even though (1) the fee is based on costs incurred by the state for management and disposal of the out-of-state waste, and (2) management and disposal of in-state waste is funded by a combination of a lower disposal fee and other revenues.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Background	3
B. The Surcharge on Out-of-State Waste	4
1. Legislative Process	4
2. Administrative Process	5
C. The Proceedings Below	7
SUMMARY OF ARGUMENT	9
ARGUMENT	13
I. INTRODUCTION	13
II. THE GOAL OF FEDERAL PROTECTION OF INTERSTATE COMMERCE IS TO PREVENT ECONOMIC ISOLATION AND PROTECTIONISM BY INDIVIDUAL STATES	16
III. NO COMMERCE CLAUSE INTEREST IS NECESSARILY IMPLICATED BY OREGON'S DIFFERENTIAL FEE STRUCTURE FOR IN-STATE AND OUT-OF-STATE WASTE	21
A. Oregon's Surcharge on Out-of-State Waste Is Not Patently Discriminatory	23
B. Oregon's Surcharge Is Not Protectionist; But Even an Incidental Resource Protectionist Effect Would Not Render Oregon's Fee Invalid	25
C. Oregon's Surcharge Is Cost-Based	30

TABLE OF CONTENTS—Continued

	Page
IV. OREGON'S STATUTORY FUNDING SCHEME SURVIVES CONSTITUTIONAL SCRUTINY BECAUSE THE BURDENS IMPOSED ON INTERSTATE COMMERCE ARE ONLY INCIDENTAL AND OREGON HAS AN UNQUESTIONABLY LEGITIMATE INTEREST IN RECOVERING THE COSTS OF IN-STATE DISPOSAL OF OUT-OF-STATE WASTE	32
V. OREGON'S SOLID WASTE DISPOSAL FUNDING STRUCTURE PASSES "CLOSE SCRUTINY" REVIEW	36
A. Oregon Lacks Alternatives to Its Current Funding Structure That Are Adequate To Preserve Its Interests	36
B. Out-of-State Interests Properly Can Be Made To Pay Their Fair Share of a State's Costs Where Goods in Direct Competition Are Not Involved and Interstate Commerce Is Not Asked To Bear the Brunt of the State's Regulatory Efforts	39
VI. TO THE EXTENT PETITIONERS CONCEDE THAT A COST-BASED SURCHARGE MAY IN SOME CIRCUMSTANCES BE PERMISSIBLE, AND THEY INSTEAD ATTACK ONLY ASPECTS OF OREGON'S FEE, THE COURT'S REVIEW SHOULD GO NO FURTHER	42
A. Petitioners Have Abandoned Any Claim That the Surcharge in Fact Is Protectionist in Purpose or Effect	43
B. Petitioners Have Waived Their Fact-Based Challenges to the Components of the Fee	45
C. The Record Before the Court Provides an Inadequate Basis To Test the State's Calculation of its Surcharge	46
CONCLUSION	49

TABLE OF AUTHORITIES

Cases Cited	Page
AFSCME Local 2623 v. Dept. of Corrections, 315 Or. 74, 843 P.2d 409 (1992)	2
American Trucking Associations v. Scheiner, 483 U.S. 266 (1987)	33, 40
Austin v. New Hampshire, 420 U.S. 656 (1975)	17, 18
Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978)	19, 31
Barnard v. Thorstenn, 489 U.S. 546 (1989)	20
Beck v. Washington, 369 U.S. 541 (1962)	46
Cardinale v. Louisiana, 394 U.S. 437 (1969)	46
Chemical Waste Management, Inc. v. Hunt, 112 S.Ct. 2009 (1992)	1, *passim*
Clark v. Paul Gray Co., 306 U.S. 583 (1939)	33
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981)	21, 33, 34, 47
Complete Auto Transit v. Brady, 430 U.S. 274 (1977)	21, 34
Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972)	21, 33, 34
Fort Gratiot Landfill v. Mich. Dept. of Natural Resources, 112 S. Ct. 2019 (1992)	29
Gilliam County v. Dept. of Environmental Quality, 316 Or. 99, 849 P.2d 500 (1993)	2, 8
Gilliam County v. Dept. of Environmental Quality, 114 Or. App. 369, 837 P.2d 965 (1992)	45
Goldberg v. Sweet, 488 U.S. 252 (1989)	34
Guy v. City of Baltimore, 100 U.S. 434 (1880)	21
H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949)	16, 17, 26
Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963)	40
Henneford v. Silas Mason Co., 300 U.S. 577 (1937)	40
Hicklin v. Orbeck, 437 U.S. 518 (1978)	17, 18, 20
Hughes v. Oklahoma, 441 U.S. 322 (1979)	26, 40
Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333 (1977)	19, 26
Ingels v. Morf, 300 U.S. 290 (1937)	33

TABLE OF AUTHORITIES—Continued

	Page
Int'l Council of Shopping Centers v. Env. Quality Comm'n, 27 Or. App. 321, 556 P.2d 138 (1976), rev. denied (1977)	5
John v. Paullin, 231 U.S. 583 (1913)	46
Maine v. Taylor, 477 U.S. 131 (1986)	19, 35
Maryland v. Louisiana, 451 U.S. 725 (1981)	21, 23, 39
Mullaney v. Anderson, 342 U.S. 415 (1951)	31
New Energy Co. v. Limbach, 486 U.S. 269 (1988)	26, 37
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)	21
Philadelphia v. New Jersey, 437 U.S. 617 (1978)	*passim*
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	19, 32
Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946)	39
Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982)	*passim*
Toomer v. Witsell, 334 U.S. 385 (1948)	17, 20, 21, 30
Virginia v. Friedman, 487 U.S. 59 (1988)	20
Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)	19

Constitutional Provisions

U.S. Const. Art. I, Sec. 8, Cl. 3	16
U.S. Const. Art. IV, Sec. 2, Cl. 1	17

Statutory Provisions

5 U.S.C. § 706(2)(A) (1988)	7
42 U.S.C. § 6901(a)(4) (1976 ed.)	39
Or. Rev. Stat. § 183.335(12)	5
Or. Rev. Stat. § 183.400	7, 47
Or. Rev. Stat. § 183.400(3)	7
Or. Rev. Stat. § 183.400(4)	7
Or. Rev. Stat. § 183.482(7)	2
Or. Rev. Stat. § 459.015(2)	3
Or. Rev. Stat. § 459.235(2)	3
Or. Rev. Stat. § 459.235(3)	3
Or. Rev. Stat. § 459.236	3
Or. Rev. Stat. § 459.297(1)	4
Or. Rev. Stat. § 459.297(2)	5, 30

TABLE OF AUTHORITIES—Continued

	Page
Or. Rev. Stat. § 459.298	5, 30
Or. Rev. Stat. § 459.705 *et seq.*	3
Or. Rev. Stat. § 459A.110	3
Or. Rev. Stat. § 459A.110(5)	3
Or. Rev. Stat. § 459A.115	3
Or. Rev. Stat. § 459A.120	3

Administrative Provisions

Or. Admin. R. § 137-01-030	6
Or. Admin. R. § 340-90-005 *et seq.*	4
Or. Admin. R. § 340-92-005 *et seq.*	4
Or. Admin. R. § 340-93-001 *et seq.*	4
Or. Admin. R. § 340-95-001 *et seq.*	4
Or. Admin. R. § 340-96-001 *et seq.*	4
Or. Admin. R. § 340-97-110(3)	6
Or. Admin. R. § 340-97-120(7)	7

Miscellaneous

Coase, "The Problem of Social Cost," 3 J.L. & Econ. 1 (1960)	49

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case presents the question not decided in *Chemical Waste Management, Inc. v. Hunt,* 112 S.Ct. 2009 (1992): whether a fee imposed on out-of-state waste violates the Commerce Clause when the fee recovers only costs incurred by the state that are related to the out-of-state waste. *See id.,* at 2016 n.9. Oregon imposes a cost-

based fee on out-of-state waste that is disposed in Oregon landfills. Or. Rev. Stat. § 459.298. Costs associated with in-state waste are paid through a lesser per-ton fee imposed on the waste's disposal and through other state revenue sources. Petitioners challenged Oregon's out-of-state waste disposal fee in state court, arguing that the fee violates the Commerce Clause because it is greater than the disposal fee assessed on in-state waste.

Selecting a swift but narrow path to appellate court review, petitioners filed a direct challenge in the Oregon Court of Appeals to the administrative rules setting the surcharge on out-of-state waste.[1] Petitioners' choice of forum thus bypassed any method of factfinding,[2] and it limited judicial review under Oregon law to "the face of the rule and law pertinent to it." *Gilliam County v. Dept. of Environmental Quality*, 316 Or. 99, 113, 849 P.2d 500 (1993) (hereafter citing decision in Oregon Waste Systems (OWS) Pet. Cert. 19a)[3] *quoting AFSCME Local 2623 v. Dept. of Corrections*, 315 Or. 74, 79, 843 P.2d 409 (1992). Precluded by petitioners' procedural choice from considering "whether the surcharge is impermissible as 'disproportionate' to the services rendered or to the costs incurred by the State," *ibid.*, the Oregon Court of Appeals and Oregon Supreme Court reviewed the surcharge only to determine whether it was constitutional on its face. The courts held—unremarkably, given the fee's express statutory nexus to actual costs—that the surcharge was not facially unconstitutional. OWS Pet. 17a, 43a-44a.

[1] The Oregon Court of Appeals ordinarily is the State's first level of appellate review, rather than a court of original jurisdiction. Its original jurisdiction in this instance is highly unusual.

[2] The Oregon Court of Appeals' authority to engage in factfinding is limited to claims of procedural irregularity in administrative proceedings that do not appear on the face of the record. As to such claims, the court may appoint a master to take evidence and prepare recommended findings. Or. Rev. Stat. § 183.482(7).

[3] For convenience, all references to the opinions of the Oregon Supreme Court and Oregon Court of Appeals are to the opinions as reproduced in the appendix to the OWS Petition for Certiorari.

A. Background

Oregon's approach to solid waste is first to reduce, reuse, and recycle—and then to dispose of the remaining waste in a safe, economic and proper manner. *See* Or. Rev. Stat. § 459.015(2)(a), (i). The state's goals are pursued through a comprehensive system of regulations and fees. *See generally* OWS Pet. Cert. at 34a-36a and n.14 (citing relevant statutes and describing system). Operators of landfill sites must pay a permit fee to cover the costs to the state of the permiting process and inspection programs. Or. Rev. Stat. § 459.235(2). An annual permit fee based on volume is also charged to landfill operators, Or. Rev. Stat. § 459.235(3), and an additional volumetric charge is assessed to pay for removal of hazardous substances at "orphan" sites throughout the state. Or. Rev. Stat. § 459.236. Solid waste generated in Oregon pays a disposal fee of 85 cents per ton.[4] Or. Rev. Stat. §§ 459A.110-.115. The proceeds from that fee are dedicated—that is, they must be used by the Oregon Department of Environmental Quality (DEQ) to fund its program for solid waste management, planning, waste reduction and recycling efforts, household hazardous waste disposal, and groundwater monitoring. Or. Rev. Stat. § 459A.120. Finally, specific waste problems have resulted in other restrictions and fees. For example, Oregon buyers of new motor vehicle tires pay another fee to help fund environmentally sound disposal of old tires. Or. Rev. Stat. §§ 459.705 to 459.790.

Oregon residents and others with sufficient in-state activities to pay taxes also finance sold waste management activities though general funds generated by income tax revenues. R. 671. These funds are used to help cover

[4] Petitioner Columbia Resources Company, L.P. (CRC) repeatedly refers to a $.50 per-ton fee on instate waste. CRC Br. 7, 8, 9, 15, 28, 31. It is undisputed, however, that as a result of a $.35 surcharge, in-state waste pays a fee of $.85 per ton. Or. Rev. Stat. §§ 459A.110(5) and 459A.115. *See* OWS Br. 6, 23.

the agency's costs of administering the state solid waste regulatory program, rulemaking and policy development, and statewide solid waste management planning. R. 592. State taxpayers also help fund tax credits and subsidies that Oregon makes available to landfill operators and others. For example, private companies, such as petitioner Oregon Waste Systems, Inc. (OWS), take an Oregon income tax credit of up to 50 percent for landfill expenses that qualify for Oregon's pollution control tax credit, including liner construction, leak detection systems, leachate collection and treatment, and groundwater monitoring. R. 593.

These fees and taxes, and the solid waste management program they help fund, serve the state's goals of reducing and recycling solid waste and of properly disposing of the waste that remains.[5] Other things being equal, as a result of these efforts, Oregon landfill capacity will be consumed more slowly—to the benefit of present and future generations of Oregonians *and* present and future generations of out-of-state residents whose waste can and will be disposed of in Oregon.

B. The Surcharge on Out-of-State Waste

1. *Legislative Process*

It was in this context that the Oregon legislature concluded that out-of-state waste should be required to pay the actual costs to the state of disposing of that waste. Or. Rev. Stat. § 459.297(1), passed in 1989, provides that "every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site shall

[5] See Or. Admin. R. § 340-90-005 *et seq.* (recycling and waste reduction); § 340-91-010 *et seq.* (waste reduction program and recycling certification); § 340-92-005 *et seq.* (general regulations regarding solid waste); § 340-93-001 *et seq.* (municipal solid waste landfills); § 340-95-001 *et seq.* (land disposal sites other than municipal solid waste landfills); § 340-96-001 *et seq.* (special rules for selected solid waste disposal sites).

pay a surcharge" to be set by the Environmental Quality Commission (EQC). The amount of the surcharge is to be established by rule and "shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste general out-of-state which are not otherwise paid for under the provisions of [statutes relating to solid waste disposal, domestic solid waste disposal, and household hazardous waste disposal]." Or. Rev. Stat. § 459.298. The statute itself thus limits the surcharge to "costs" incurred in disposing of the out-of-state waste, to the extent those costs are not already paid by other fees and assessments borne by in-state and out-of-state waste disposal alike. Under the statute, then, the surcharge on out-of-state waste can be less than the full cost to the state of disposal, but it can not be more than that cost.

The surcharge is to be based on costs that may include, but need not be limited to, out-of-state waste's proportionate share of the costs incurred for solid waste management, issuing new and renewal permits for solid waste disposal sites, environmental monitoring, and site closure and post-closure activities. Or. Rev. Stat. § 459.298. The funds generated by the surcharge are dedicated revenues—that is, they must be used by the Department of Environmental Quality (DEQ) to help pay the costs of "administering the solid waste program" established by Oregon law. Or. Rev. Stat. § 459.297(2).

2. *Administrative Process*

Pursuant to the statutory directive, the Environmental Quality Commission (EQC) undertook a rulemaking procedure to set the fee. EQC held hearings on the surcharge in the cities of Portland, Arlington (the closest town to the OWS landfill), and Medford, and received testimony and written comments from dozens of interested parties.[6]

[6] Oregon's rulemaking proceedings are informal and are akin to typical legislative proceedings. An agency is not required to base its rules on information received in the public hearings unless the agency's organic statute specifically imposes that requirement. Or. Rev. Stat. § 183.335(12). *Int'l Council of Shopping Centers v. Env.*

EQC retained an independent consultant, the National Economic Research Associates (NERA), to review the methodology used in calculating the surcharge, and then revised the methodology and fee in response to NERA's comments. R. 665, 725-750. A critical standard throughout the rulemaking process was the nexus between the cost to the State of out-of-state waste and the amount of the surcharge:

> The amount of the surcharge is to be determined by a reasonable assessment of the cost to Oregon of accepting out-of-state waste. The surcharge amount should *not* be inflated to discourage importation of waste, nor deflated to encourage importation of waste.

R. 588 (emphasis in original); *see also* R. 0022, 0033, 0197, 0667.

After extensive public hearings, EQC adopted administrative rules imposing the surcharge.[7] The rules, which became effective January 1, 1991, set the surcharge at $2.25 per ton. Or. Admin. R. § 340-97-110(3) (formerly

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Quality Comm'n, 27 Or. App. 321, 556 P.2d 138 (1976), *rev. denied* (1977). Similarly, witnesses in the hearings are not sworn, cross-examination of witnesses does not occur, no person is identified as a party nor does anyone participating in the hearing have to claim or show an interest in the rule in order to appear and be heard. *See* Oregon Attorney General's Model Rules of Procedure, Or. Admin. R. § 137-01-030. In short, the hearings are opportunities for public comment, but not formal record-building proceedings that create an official basis for or limitation on the agency's exercise of policy discretion.

[7] The administrative record provides support for the components of the surcharge and meets EQC's statutory obligations. The record does not and was not intended to give detailed consideration to the impact of the surcharge on the volume of out-of-state waste, the relative cost of disposing of out-of-state waste in Oregon as opposed to other states, or related factual matters that petitioners would have to prove to make out a Commerce Clause violation.

Or. Admin. R. § 340-61-115); Or. Admin. R. § 340-97-120(7) (formerly Or. Admin. R. § 340-61-120).

C. The Proceedings Below

Petitioners challenged the validity of the rules in the Oregon Court of Appeals under Or. Rev. Stat. § 183.400, a part of Oregon's administrative procedures act that differs markedly from federal administrative law. Although conferring broad standing to challenge a rule—"any person" may file a petition[8]—the scope of review under Or. Rev. Stat. § 183.400 is unusually narrow. Unlike the familiar federal "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A) (1988), the Oregon statute limits both the documents that can be reviewed and the actions the court may take. The court may examine only the rule itself, the statutory provisions authorizing the rule, and "all documents necessary to demonstrate compliance with applicable rulemaking procedures." Or. Rev. Stat. § 183.400(3). And the reviewing court may declare the rule invalid only if, on the record before it, it finds that the rule "(a) violates constitutional provisions; (b) exceeds the statutory authority of the agency; or (c) was adopted without compliance with applicable rulemaking procedures." Or. Rev. Stat. § 183.400(4). A rule challenge does not include review to see whether the rule is supported by substantial evidence. That is, the state court will not invalidate a rule on the basis that there is no testimony supporting it or that the record does not include evidence justifying it.[9]

Petitioners did not contend that EQC exceeded its statutory authority in adopting the surcharge or that it failed to follow applicable rulemaking procedures, and their contention that one component of the surcharge was inconsistent with another state statute was summarily rejected.

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[8] Or. Rev. Stat. § 183.400(1).

[9] *See* n.5, *ante*.

Gilliam County v. Dept. of Environmental Quality, OWS Pet. 10a. Their challenge rested principally on state and federal constitutional grounds.[10]

The state courts considered petitioners' facial challenge to the surcharge and held that the State's effort to make out-of-state waste pay its fair share and no more was consistent with the Commerce Clause. *Id.*, OWS Pet. 15a-19a; 38a-44a. And given the limitations of the procedure petitioners selected, their attempt to peer behind the face of the statute and the rule was unavailing:

> [B]efore we could say that the rules are unconstitutional, petitioners would have to show that the fees are excessive for the purposes for which they are collected or that there is no sufficient relation between the measure employed and the extent or manner of use of the state provided service.
>
> * * * *
>
> A facial review of the enabling legislation and the rules does not show that the fees are either excessive or unrelated to the state provided service. ORS 183.440(3) does not permit us to consider the evidence that petitioners would have to produce to show that the fees are, nevertheless, manifestly disproportionate to the costs incurred by the state to manage and facilitate disposal of out-of-state waste.

Id., OWS Pet. 44a; *see also id.* at 19a.

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[10] Both Oregon courts agreed with petitioners that a provision providing for legislative review of the surcharge violated the Oregon Constitution, but they concluded that the review procedure was severable and did not render the surcharge invalid. OWS Pet. 11a-15a, 27a-38a.

SUMMARY OF ARGUMENT

Oregon assesses a per-ton fee on out-of-state waste disposed of in Oregon landfills. By law, the fee must be based on the costs the State incurs that are attributable to that waste. The state agency responsible for setting the fee has set it at $2.25 per ton. The fee for disposal of in-state waste is set, by statute, at $.85 per ton. The differential in the disposal fees, however, does not mean that the overall costs borne by Oregon citizens and waste generators for in-state waste disposal are lower than for disposal of out-of-state waste. Under Oregon's statutory scheme, in-state disposal costs are recovered partially through the $.85 per ton disposal fee and also through general fund revenues (*i.e.*, state income taxes) that support the overall statewide waste management program. Out-of-state waste producers pay a higher disposal fee because general revenues and fees generated from in-state waste would otherwise have to support the proportionate share of Oregon's program attributable to the costs of out-of-state waste disposal.

Petitioners argue that this scheme for recouping out-of-state garbage disposal costs patently discriminates on its face and fails the Commerce Clause "close scrutiny" test because Oregon has a non-discriminatory alternative. That alternative is for Oregon to abandon its chosen method of financing in-state waste reduction and disposal in favor of one that recoups all costs through a uniform dumping fee. The only other option is for Oregon to forego recovery of the full cost of out-of-state garbage disposal by reducing the out-of-state fee to match the in-state $.85 fee, an option which effectively would require Oregon to provide a subsidy to out-of-state waste producers.

Petitioners' arguments begin with the flawed premise that Oregon's funding scheme patently discriminates against interstate commerce. Petitioners narrowly focus on the differential between the in-state and out-of-state

disposal fees as the sole basis for labeling Oregon's fee "patently discriminatory." Under the statutory scheme as a whole, however, Oregon recovers the full cost of out-of-state garbage through dumping fees that ultimately are passed on to non-resident garbage generators, while recovering the full cost of in-state garbage disposal from a combination of dumping fees (that similarly are passed on to Oregon garbage generators) and income and other taxes that are or will be paid in-state. This is not "economic protectionism"—an attempt by the state to isolate itself from out-of-state waste, or an attempt to put any person or firm at a competitive disadvantage. At most, petitioners' arguments boil down to a claim of "resource protectionism." Where resource rather than economic protectionism is the Commerce Clause evil arguably implicated by state regulation, the burdens placed on out-of-state users of an in-state resource need not be identical to the burdens placed on in-state users, as long as the burdens are reasonably equivalent. In Oregon, they are.

The solid waste management funding structure that the Oregon legislature has adopted serves the dual objectives of distributing the costs of Oregon's system broadly to the in-state interests that benefit from them, and narrowly recovering those program costs from the out-of-state producers that also benefit. The differential fee on in-state and out-of-state waste, because it is cost-based, does not patently discriminate against interstate commerce. The statutory fee system burdens in-state and out-of-state waste generators evenhandedly. Whatever restriction Oregon's fee may cause to the flow of garbage into the state—although none has been shown—is merely a consequence of Oregon's legitimate objective of capturing the actual costs the disposal of that waste creates for Oregon, and it is a burden on interstate commerce that is clearly outweighed by that objective. Thus, unlike the differential fee at issue in *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009 (1992), Oregon's fee is not protectionist in

purpose, nor has it been demonstrated to have that effect. Oregon should not have to show that there are no other ways to finance its solid waste program where there is nothing protectionist about Oregon's current scheme.

Oregon has sound policy reasons for collecting the revenue to fund its program in part through general tax dollars, rather than exclusively through an across-the-board user fee placed on the disposal of in-state and out-of-state garbage alike. All Oregon citizens and others with significant in-state contacts, regardless of the amount of in-state garbage they generate, benefit from a clean and healthful environment, which is the overall goal of Oregon's solid waste management program. The benefit runs generally to the State as a whole, and it accrues regardless of any one individual's or business's direct or indirect contribution to the problem of waste production. Therefore the Oregon legislature reasonably has determined that the State's efforts to keep Oregon's environment as clean and livable as possible should be funded in common by those who benefit more generally from Oregon's efforts. Axiomatically, non-residents collectively do not share in that benefit. Out-of-state residents derive a measurable benefit from Oregon's program only at the point that they seek to take advantage of available Oregon landfill capacity by importing their waste into Oregon for disposal. Thus, even if Oregon could somehow assess a general tax on out-of-state residents—which it obviously cannot do—any attempt to recover the costs attributable to out-of-state waste through such a mechanism would make no sense. Far more rational is the recovery mechanism Oregon in fact uses—a special and tailored fee assessed only on the garbage that out-of-state producers in fact import into Oregon to consume Oregon landfill capacity.

Accordingly, even if this Court were to conclude that Oregon's solid waste funding structure should be held to the most exacting Commerce Clause standards, the

fee should be sustained. If Oregon is to pursue its concededly legitimate goal of recovering the full cost of the disposal of out-of-state waste in its landfills, Oregon has no alternative but to impose the $2.25 fee. No principled Commerce Clause rationale should coerce the State into altering its in-state funding structure to eliminate the differential fee. For Oregon to be forced to abandon its general revenue funding of in-state garbage management and disposal and increase the fee for that disposal to match the out-of-state fee would not eliminate any burden on interstate commerce that incidentally results from the out-of-state fee. Non-resident waste generators would continue to pay the same fee that they presently do; any deterrent effect the present fee may have on the importation into Oregon of out-of-state waste would remain unchanged.

Requiring Oregon to restructure its in-state funding system where no discernible benefit to interstate commerce would result is particularly inappropriate given this Court's recognition of the deference and leeway federal courts should give States in the methods they choose to fund the provision of basic governmental services. That basic principle of federalism would be severely undermined were the Court to tell Oregon that if it seeks to pursue the legitimate objective of requiring out-of-state garbage to pay its fair share, it may *only* do so in one manner. The State should not be placed in such a political straightjacket, where doing so furthers none of the basic purposes or policies that underlie the Commerce Clause or this Court's jurisprudence construing that clause.

Petitioners conclude their briefs in this Court with a variety of fact-based arguments about the components of Oregon's fee and perceived flaws in the way it was calculated. Those are claims that petitioners either did not or could not raise below; they inappropriately press them at this level. Having availed themselves of a narrow procedural vehicle to obtain expedited review of the face

of Oregon's rule, petitioners cannot now claim that the Court should engage in an intensive fact-based examination that has never been made by the state courts and that cannot be reliably made on the record in this case.

ARGUMENT

I. INTRODUCTION

Although some private commercial interests (*i.e.*, privately operated landfills, entrepreneurial garbage haulers) have an economic stake in the "business" of solid waste disposal, the ultimate oversight and responsibility for managing waste is intensively governmental. Oregon, like most or all States, has embarked on a comprehensive program of managing waste generated within or imported into its borders. To better meet the problem of the growing amount of waste and the growing demand that something be done with it, Oregon has an extensive regulatory framework designed to minimize waste and to manage its disposal. The State's efforts take many forms: reuse, reduction, recycling and, ultimately, environmentally safe disposal. As is true of any governmental regulatory effort, Oregon's waste program requires an investment of human time and physical resources, which in turn requires funding. Typical of the funding for most programs that provide general benefits to all of a State's citizens, essential revenue for Oregon's regulatory program comes from a combination of funds generated by statewide taxes and by special user fees. The manner in which Oregon comprehensively regulates its statewide waste management program and provides funding for it is, in short, unremarkable.

In challenging Oregon's fee on out-of-state waste disposal, petitioners proceeded on a narrow theory, and they availed themselves of a limited state court proceeding adequate to address their theory, but little more. By bringing an original "rule challenge" action in the Oregon Court of Appeals, petitioners directed their constitutional

challenge and the court's review to the face of the rule only. The review petitioners asked for was myopic. The rule was to be viewed in isolation, severed from Oregon's comprehensive waste management program as a whole and from the full range of other costs the State incurs and its method of funding those costs. The only record available to the state court was the public hearing and agency documentation of the informal, non-adjudicatory rulemaking procedure. The State could not present to the court evidence or testimony from agency officials or other experts to explain the fee or to defend the agency's calculation of the costs of out-of-state waste. The record was not developed for the purpose of demonstrating the effects of the fee on the flow of interstate commerce into Oregon landfills. Nor could the state courts, given the limitations on their jurisdiction, examine those effects. Finally, the fees and financial burdens that are placed on in-state interests were wholly beyond the scope of the state courts' review or the record available to them.

The restrictions on the judicial review that petitioners chose, however, fit the narrow scope of their theory. Their claim was that Oregon's fee facially and patently "discriminates" against interstate commerce because the per-ton disposal surcharge is greater for out-of-state waste than for in-state waste, and it is therefore unconstitutional. Their position was that no set of facts or circumstances could exist under which the fee could be considered "nondiscriminatory," and thus the burden fell upon the State to demonstrate that no nondiscriminatory alternative was available. At that point, petitioners apparently hoped to hamstring the State in presenting a defense, arguing, as they argue still, "that the limited form of judicial review authorized by Oregon's Administrative Procedures Act disables, in large part, the State from factually justifying its discriminatory treatment of foreign waste." CRC Br. 13-14. Alternatively, they urged, as they urge still, that an across-the-board fee on all waste disposal was so

plainly "adequate" that the State needed no opportunity to demonstrate the absence of a satisfactory nondiscriminatory alternative. *E.g.*, CRC Br. 14; OWS Br. 19-20.

The question this case presents is both significant and stark: Under the Commerce Clause, may a State under any circumstances impose a cost-based disposal fee on out-of-state waste that is higher than the disposal fee assessed on in-state waste? Petitioners invite this Court to give an equally stark answer: No, not ever. Under petitioners' analysis, the cost-based character of the surcharge is irrelevant; the fact that, absent the surcharge, out-of-state waste disposal necessarily is subsidized by in-state revenues is of no moment; and the lack of any demonstration that the surcharge in purpose or in effect discourages the importation of out-of-state waste or conserves resources for in-state waste alone is beside the point. As petitioners approach the issue, the mere fact of a surcharge on out-of-state waste is the be-all and end-all of the inquiry, because the differential is "facially discriminatory." No further inquiry is required or, indeed, permitted.

The dilemma their position poses for States is real. The result petitioners seek would leave a State with only two choices. Either a State must provide the benefit of its managed solid waste disposal program at less than its actual costs to out-of-state interests that reap the advantage of the State's self-funded regulatory and conservation efforts, or a State must completely restructure its in-state method of funding its waste management program. The fact that petitioners' position would force States to those options is troubling in itself. Their position is all the more troubling when they disavow the relevance of any realistic examination of the effect of the state fee, with the result that States are forced to these untenable choices in an effort to protect interstate commerce that has suffered no harm in fact.

Petitioners' approach is artificial, and has nothing to commend it in terms of principle or result. Solid waste unquestionably is an article of commerce subject to the full protection of the federal Commerce Clause. But that protection must be meaningfully examined in the context of the nature of the commerce for which protection is sought. Petitioners too quickly assume that solid waste can be equated with consumer goods that are actively bought and sold in a competitive market environment. Facially disparate fees on market goods that must compete for the same buyer readily and immediately implicate values that are fundamental to the Commerce Clause —the free flow of goods across state lines, anticompetitive fees and regulations, protection of local economic interests, and economic isolation. Landfill operators may compete with one another for waste, but in-state and out-of-state waste are not competing goods in a common market in the sense that apples and automobiles are. The fact that a different fee structure applies to one and not to the other at an isolated point in the long chain of their generation, collection, transport and disposal provides insufficient information, in and of itself, to determine whether interstate commerce is affected in any way that the Commerce Clause protects against. Where the surcharge reflects the regulatory costs that are fairly attributable to the disposal of out-of-state waste, a facial commerce Clause challenge to the fee must fail.

II. THE GOAL OF FEDERAL PROTECTION OF INTERSTATE COMMERCE IS TO PREVENT ECONOMIC ISOLATION AND PROTECTIONISM BY INDIVIDUAL STATES.

The Constitution's grant to Congress of the power to regulate interstate commerce, Article I, section 8, clause 3, carries with it negative implications that limit state power over such commerce. *See Philadelphia v. New Jersey,* 437 U.S. 617, 623 (1978); *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 535 (1949). "No state

may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade." *Chemical Waste Management, Inc. v. Hunt,* 112 S. Ct. at 2012. This is the basic teaching of the cases involving garbage—and, indeed, is a straightforward application of the general Commerce Clause principle that "our economic unit is the Nation." *H.P. Hood & Sons v. DuMond,* 336 U.S. at 537. *See Philadelphia v. New Jersey,* 437 U.S. at 623, 627.

The Constitution's intent to "fuse into one nation a collection of independent, sovereign states," *Toomer v. Witsell,* 334 U.S. 385, 395 (1948), and to "establish a norm of comity," *Austin v. New Hampshire,* 420 U.S. 656, 660 (1975), finds expression as well in the Privileges and Immunities Clause, Article IV, section 2, cl. 1, which in origin and interpretation parallels the Commerce Clause. *Hicklin v. Orbeck,* 437 U.S. 518, 531-34 (1978).[11] In *Hicklin,* the Court discussed the interrela-

[11] The discussion in *Austin v. New Hampshire* demonstrates the reinforcing values contained in the Privileges and Immunities and Commerce Clauses:

> The origins of the Clause do reveal, however, the concerns of central import to the Framers. During the preconstitutional period, the practice of some States of denying to outlanders the treatment that its citizens demanded for themselves was widespread. The fourth of the Articles of Confederation was intended to arrest this centrifugal tendency with some particularity. It provided:
>
> > "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."
>
> The discriminations at which this Clause was aimed by no means eradicated during the short life of the Confederation,

tionship of the Privileges and Immunities Clause and the Commerce Clause:

> Although appellants raise no Commerce Clause challenge to the [Alaska Hire] Act, the mutually reinforcing relationship between the Privileges and Immunities Clause and the Commerce Clause—a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism, *see Baldwin v. Montana Fish and Game Comm'n,* 436 U.S. [371] at 379-380 [(1978)]—renders several Commerce Clause decisions appropriate support for our conclusion. * * *

The Court in *Hicklin* concluded its opinion by stating:

> As Mr. Justice Cardozo observed in *Baldwin v. G.A.F. Seelig,* 294 U.S. 511, 523 (1935), the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

437 U.S. at 534.

Recognizing "economic isolation" and "protectionism" as the evils the Constitution sought to prevent, but aware that legitimate state legislation may incidentally burden

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and the provision was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation. * * *"

Id. at 660-661 (footnote omitted). The phrase within Article IV of the Articles of Confederation providing that the people of each State "should enjoy [within any other state] all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof, respectively," was deleted by the constitutional framers, who had instead conferred on the federal government exclusive power to regulate commerce among the several states. *See Lemmon v. People,* 20 NY 562, 627 (1860) (opinion of Wright, J.), cited in *Austin v. New Hampshire,* 420 U.S. at 661, n.6. Nothing suggests, however, that this amendment intended in the area of commerce to confer greater rights on citizens than they would have enjoyed under the Privileges and Immunities Clause.

interstate commerce, *Philadelphia v. New Jersey,* 437 U.S. at 623-24, this Court has constructed a test that examines the state objectives, the means chosen to advance those objectives, and the impact on interstate commerce. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Philadelphia v. New Jersey,* 437 U.S. at 624, quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). However, if a state law discriminates against interstate commerce, on its face or in practical effect, it typically will be subjected to "close scrutiny" to determine whether it serves a legitimate local purpose and whether that purpose could be served as well by available nondiscriminatory means adequate to preserve the local interests at stake. *Chemical Waste Management v. Hunt,* 112 S. Ct. at 2014, *Maine v. Taylor,* 477 U.S. 131, 139 (1986); *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 353 (1977). And when a state law amounts to simple economic protectionism, the Court has on occasion adopted a "virtually per se rule of invalidity." *Philadelphia v. New Jersey, supra,* 437 U.S. at 624; *see also Wyoming v. Oklahoma,* 112 S. Ct. 789 (1992).

A closely parallel test has been applied under the Privileges and Immunities Clause. The "standard against which a State's differential treatment of nonresidents would be evaluated" [12] was articulated in *Toomer v. Witsell,* where the Court recognized that a disparity in treatment between in-state and out-of-state residents is constitutional if the State has valid reasons, apart from residency, for the difference:

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It

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[12] *Baldwin v. Montana Fish and Game Comm'n,* 436 U.S. 371, 399-400 (1978) (Brennan, J., dissenting).

> does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

334 U.S. at 396 (footnote omitted).[13]

In short, under either the Commerce Clause or the Privileges and Immunities Clause, the Court examines a State's interests to ensure that they are legitimate. It also examines the means a State chooses to advance those interests to ensure that they do not unnecessarily intrude on the federal interest in preserving national cohesion and preventing state isolationism. It is no surprise, then, that the tests under the two clauses are similar in text and in result. As this Court has appropriately recognized, the analysis under one clause is informative of the analysis to be used in similar cases arising under the other clause. *See, e.g., Hicklin v. Orbeck*, 437 U.S. at 534.

Finally, in applying the foregoing tests, the Court consistently has recognized one principle that is of particular import in the analysis of the constitutionality of Oregon's solid waste funding scheme involved here. That principle is that a state is allowed to recover from interstate com-

[13] For recent cases in which this Court has applied the *Toomer* test, *see Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (invalidating Virginia's residency requirement for admission to the bar, without examination, of lawyers admitted to practice in another state); *Barnard v. Thorstenn*, 489 U.S. 546 (1989) (invalidating local district court rule of the Virgin Islands imposing residency requirement for admission to the district court bar).

merce the "fair share" of the state's costs that are attributable to that commerce. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 620 (1981); *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977); *Toomer v. Witsell*, 334 U.S. at 399.

> We . . . regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike.

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707, 714 (1972). *See also Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959) (recognizing that "the founders did not intend to immunize [inter]state commerce from carrying its fair share of the costs of state government in return for the benefits it derives from within the State.")[14]

III. NO COMMERCE CLAUSE INTEREST IS NECESSARILY IMPLICATED BY OREGON'S DIFFERENTIAL FEE STRUCTURE FOR IN-STATE AND OUT-OF-STATE WASTE.

Petitioners' central argument is that Oregon's funding scheme for recouping out-of-state garbage disposal costs

[14] Petitioners cite *Guy v. City of Baltimore*, 100 U.S. 434 (1880) for the proposition that state fees which purport to be cost-based may nevertheless impermissibly discriminate against interstate commerce. OWS Br. 11-12. While the proposition is sound as far as it goes, it does not go very far in this case. In *Guy*, a fee denominated a "wharfage" fee was imposed only on vessels carrying out-of-state goods. The Court had no difficulty invalidating this discriminatory fee as the protectionist measure it obviously was. The State was seeking to "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." 100 U.S. at 443. Moreover, there was no showing that the fee was in fact related to wharf maintenance costs or that in-state interests contributed to wharf maintenance in other ways. The case provides minimal guidance here.

"patently discriminates" on its face against interstate commerce and that it is invalid under this Court's decision in *Chemical Waste Management v. Hunt,* 112 S.Ct. 2009. Petitioners maintain that because Oregon could equalize the in-state and out-of-state waste disposal fees, either by lowering the out-of-state fee to $.85 per ton, or by raising the in-state fee to $2.25 per ton, it is *per se* unconstitutional for Oregon to have a disparate fee of any kind in any amount. OWS Br. 19-20; CRC Br. 10, 14. In effect, petitioners' position is that the fact of a disparate fee on the disposal of out-of-state garbage, without more, is enough to establish that Commerce Clause interests are infringed by Oregon's surcharge, thus requiring Oregon to demonstrate under a close scrutiny test that it has no choice but to impose the surcharge if its interests are to be served.

Oregon can meet that stringent test, if it is required to do so. But petitioners' attempt to treat *Chemical Waste Management v. Hunt* as dispositive oversimplifies the analysis, and disregards much of the Court's decision and its rationale. The only similarity between the Alabama fee challenged in *Chemical Waste* and the fee challenged here is that in each case the State placed higher disposal costs on out-of-state waste than on in-state-waste. There, the similarity ends. The Alabama out-of-state fee was dramatically higher—$72 more—than the in-state fee, a fact which in and of itself suggested that both the purpose and effect of the fee was to deter the flow of out-of-state waste across Alabama's borders. Alabama, moreover, conceded what the breadth of the differential alone suggested—that Alabama's purpose in setting the significantly higher fee was to reduce the flow of out-of-state waste into the Alabama disposal facility. 112 S. Ct. at 2015 and nn.7 & 8. Both record evidence and factual findings established that Alabama had achieved its intended effect: in fact, the importation of out-of-waste had been drastically reduced as a direct result of the higher fee. 112 S. Ct. at 2014 n.4. Finally, and of particular significance

for this case, Alabama made no attempt to justify its out-of-state disposal fee on the basis that the fee reflected actual regulatory costs Alabama incurred in disposing of that waste. To the contrary, the Court in its decision specifically noted that Alabama had failed to justify the fee on any cost-related basis, and it specifically reserved the question whether the outcome would have been the same had Alabama's fee been based on actual state costs. 112 S. Ct. at 2016, n.9.

For petitioners to argue, as they have throughout this litigation, that the decision in *Chemical Waste* is controlling is to invoke tests rather than analysis, and to serve results rather than principle. Oregon's surcharge on out-of-state waste disposal is, in fact, distinguishable from the Alabama fee in ways that do and should make a difference under the Commerce Clause. The small differential between Oregon's in-state and out-of-state waste disposal fees permits only the weakest inference that out-of-state garbage producers suffer a burden that will serve as a disincentive to their use of Oregon landfills. Given the direct and mandatory nexus to actual costs, the inference disappears. The face of the challenged fee structure does not permit a conclusion that Oregon has erected any explicit barrier to out-of-state waste, or that it is somehow burdening out-of-state interests in an effort to provide a benefit to in-state interests at out-of-state expense.

A. Oregon's Surcharge on Out-of-State Waste Is Not Patently Discriminatory.

Unlike Alabama's surcharge, Oregon's surcharge on the in-state disposal of out-of-state waste is not patently discriminatory. Indeed, it has not been shown to be discriminatory at all. Petitioners narrowly focus on the differential between the amount of the in-state and out-of-state disposal fees. The appropriate inquiry, however, should consider the entire structure the Oregon legislature has adopted to pay for solid waste management and disposal. As this Court observed in *Maryland v. Louisiana,* 451

U.S. at 756, "[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme."

Viewed in its entirety, Oregon's statutory scheme for solid waste management and disposal imposes similar costs on in-state and out-of-state waste producers. Oregon residents support DEQ's solid waste management program through income taxes and by paying, indirectly, the numerous fees imposed on landfill operators and the dumping fee on in-state waste. R. 592, 593, 671. Out-of-state waste producers pay the additional cost of the state's solid waste management program for disposing of out-of-state waste by paying, also indirectly, the out-of-state disposal fee. It is demonstrably true, then, that Oregon imposes costs on *both* in-state and out-of-state interests in order to finance solid waste management and disposal. Nothing on the face of Oregon's overall funding scheme, or in the record before the Court, demonstrates that the respective costs of in-state and out-of-state waste are not distributed fairly to in-state and out-of-state residents. Certainly it cannot be said that Oregon's funding scheme patently discriminates against interstate commerce.

The Court's decision in *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941 (1982), which petitioners almost entirely overlook, demonstrates that the mere fact that a State places greater regulatory burdens on out-of-state interests will not suffice to render the scheme "patently discriminatory." Nebraska in that case imposed more severe ground water conservation restrictions on the withdrawal of water destined for use out-of-state than it imposed on the withdrawal of water for use in-state. It did, however, impose other non-identical conservation restrictions on water withdrawn for in-state use. The Court upheld the restrictions on interstate transfers, stating that the analysis should turn on the overall evenhandedness of the regulatory burdens, not just on the fact of a difference in the regulations that applied to in-state and out-of-state interests:

> Although Commerce Clause concerns are implicated by the fact that Section 46-613.01 applies to interstate transfers but not to intrastate transfers, there are legitimate reasons for the special treatment accorded requests to transport ground water across state lines. Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation. At least in the area in which appellants' Nebraska tract is located, the first three standards of Section 46-613.01 may well be no more strict in application than the limitations upon intrastate transfers imposed by the Upper Republican Natural Resources District.

458 U.S. at 955-56.

Sporhase was a differential regulation case, not a differential fee case, but its rationale applies with full force here. As long as a state does not force out-of-state interests to bear the brunt of in-state conservation programs, a state need not demonstrate that its purposes cannot be served through alternative means—*i.e.,* identical restrictions placed on in-state and out-of-state interests. Here, Oregon does not shift to out-of-state interests the brunt of funding Oregon's solid waste management program; significant in-state financial support is directed to Oregon's regulatory program. Oregon accordingly is not required to demonstrate that it cannot place the identical fee on in-state and out-of-state waste in order for the funding scheme to pass Commerce Clause scrutiny.

B. Oregon's Surcharge Is Not Protectionist; But Even an Incidental Resource Protectionist Effect Would Not Render Oregon's Fee Invalid.

This Court consistently has used the "close scrutiny" analysis to test those statutory schemes that are designed to benefit local economic interests at the expense of out-

of-state interests, *e.g., New Energy Co. v. Limbach,* 486 U.S. 269 (1988); *Hunt v. Washington State Apple Commission,* 432 U.S. 333 (1974); *H. P. Hood & Sons, Inc. v. DuMond, supra*; or where the clear purpose or effect of the statutory scheme is to protect or preserve local resources at the expense of out-of-state interests. *Hughes v. Oklahoma,* 441 U.S. 322 (1979); *Philadelphia v. New Jersey, supra.* Petitioners far too quickly assume that both a protectionist effect and purpose can be inferred from the fact of the differential in Oregon's fees alone, and that any effect is at the expense of out-of-state interests. In fact, however, Oregon's surcharge, unlike the Alabama fee at issue in *Chemical Waste,* is not protectionist in purpose and has not been demonstrated to be protectionist in effect.

Economic protectionism traditionally is thought of as conferring on in-state products or businesses a commercial advantage in the local marketplace. *E.g., New State Energy Co. v. Limbach,* 486 U.S. at 274. Where a state's taxation, fee or regulatory structure, in purpose or effect, operates to give local products or businesses a competitive advantage over in-state products offered for sale in the state, economic protectionism is present. While garbage is an article of commerce, *Philadelphia v. New Jersey,* 437 U.S. at 622-23, it is not a commodity that is sold in the marketplace; rather, it is disposed of at a cost. Petitioner OWS, for example, does not buy garbage to put in its landfill; waste generators *pay* OWS to take their waste. Local businesses simply do not compete with out-of-state businesses in the sale of garbage. Accordingly, a differential between in-state and out-of-state waste disposal fees does not necessarily equate with economic protectionism; the fees do not alter the price of a product that is competing with other products for common purchasers, and thus do not create any kind of commercial disadvantage for out-of-state interests.

In the context of waste disposal, the only way in which "economic protectionism" might be at work is if Oregon's

fee were designed to shift a disproportionate share of the costs of its regulatory program to out-of-state interests, and in that way "protect * * * local residents' pocketbooks." *E.g., Philadelphia v. New Jersey,* 437 U.S. at 626. It cannot be said on the record before this Court, however, that under Oregon's statutory scheme, in-state and out-of-state waste producers do not share equally in paying Oregon's regulatory costs attributable to solid waste disposal.

Nor is this a case in which, based on the differential in the in-state and out-of-state fees alone, the Court can conclude that "resource protectionism" is at work. In *Chemical Waste Management v. Hunt,* the Court had little difficulty concluding that Alabama's additional $72 per-ton fee on hazardous waste was imposed in order to reduce the flow of out-of-state hazardous waste into Alabama and to preserve, by reducing out-of-state waste, Alabama's limited hazardous waste landfill capacity. The dramatic dollar disparity the surcharge created between the disposal costs of in-state and out-of-state hazardous waste was itself a basis for the inference that the fee structure was intended to protect the State's landfill capacity from out-of-state hazardous waste. Alabama, moreover, had conceded as much. Finally, the evidence demonstrated that the Alabama fee in fact had achieved its intended effect—that is, it had drastically reduced the flow of hazardous waste into Alabama.[15]

Here, no hearing has been held and no factual findings have been made as to the actual deterrent effect, if any, of Oregon's out-of-state fee. But the added $1.40 per-ton fee on out-of-state garbage does not support an inference that Oregon's fee serves as a significant disincentive for the disposal of garbage in Oregon.[16] Even if that infer-

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[15] As this Court found, "[t]he volume of hazardous waste burned at the Emelle facility fell dramatically from 791,000 tons in 1989 to 290,000 tons in 1991." 112 S. Ct. at 2014 n.4.

[16] If one were to assume that the hypothetical average nonresident generated 200 pounds of garbage per month, and assuming

ence could be drawn, that alone would not invalidate Oregon's fee or require Oregon to demonstrate why it cannot serve its cost-recovery interests in any other way. As the Court was quick to point out in *Chemical Waste Management v. Hunt,* protection of state resources is not an illegitimate purpose or effect; it simply cannot be achieved through the illegitimate means of forcing out-of-state waste to bear the burden, when in-state waste does not. 112 S. Ct. at 2014. *See also Sporhase v. Nebraska, supra* (confirming that a statutory scheme which has a resource protectionist effect is not thereby subject to "close scrutiny" review). Here, Oregon bears the full costs of disposal of in-state waste. It does not force non-residents to make up for costs Oregon is not willing itself to bear.

Finally, Oregon's statutory fee structure cannot, at least on its face, be charged with achieving resource protectionism by erecting "explicit barriers" to commerce between the States. Again, *Sporhase v. Nebraska* is instructive. The Court, as already discussed, declined to subject Nebraska's differential restrictions on in-state and out-of-state ground water transfers to "close scrutiny," for in actual operation Nebraska's regulations placed evenhanded burdens on in-state and out-of-state interests. The Court invalidated, however, Nebraska's reciprocity provision [17] because it "operate[d] as an explicit barrier to commerce between" Nebraska and Colorado. *Sporhase v. Nebraska,* 458 U.S. at 957. Unconvinced that the flat prohibition on the export of Nebraska water significantly advanced the State's legitimate conservation objectives, and finding that the prohibition was not "narrowly tailored to serve

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the fee Oregon imposes were passed on to that non-resident, the non-resident would see a 14¢ per month increase in its garbage bill.

[17] Nebraska's reciprocity provision forbade the exportation of water to another state that did not allow the export of water into Nebraska. The adjoining State of Colorado did not allow the export of ground water out of the state; hence, Nebraska's statute also did not allow its water to be transferred into Colorado.

that purpose," the Court held that it "does not survive the 'strictest scrutiny' reserved for facially discriminatory legislation." 458 U.S. at 958 (citation omitted).[18]

As *Sporhase v. Nebraska* recognizes, statutory schemes that attempt to conserve local resources by erecting "explicit barriers" to the use of those resources are subject to "close scrutiny." The two garbage cases to reach this Court in addition to *Chemical Waste Management v. Hunt* also involved statutes which, like Nebraska's reciprocity provision, facially erected "explicit barriers" to the interstate flow of garbage by directly forbidding the importation of out-of-state waste into local landfills. *Philadelphia v. New Jersey, supra* (ban on the importation of waste from outside the state); *Fort Gratiot Landfill v. Mich. Dept. of Natural Resources,* 112 S. Ct. 2019 (1992) (ban on importation of waste from outside the county in which the disposal facility is located). No legitimate argument can be made that Oregon's funding scheme for the disposal of solid waste operates in the same way. Oregon's landfills are open to out-of-state waste; no state policy makes them inaccessible to interstate commerce. Petitioners must rely on the fact of the differential fee alone to make out that claim. But as *Sporhase v. Nebraska* demonstrates, the examination must realistically focus on the overall burdens placed on in-state and out-of-state commerce. That is an examination that petitioners have scrupulously avoided, because in fact that examination reveals that there is no special disincentive

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[18] *Sporhase v. Nebraska* thus supports two points Oregon makes as to why "close scrutiny" is not appropriate in testing Oregon's garbage disposal funding scheme. First, in determining whether a statutory scheme discriminates, the Court does not look at a single part of that scheme, but examines the scheme in its entirety to determine whether interstate commerce is being treated in a discriminatory manner. Second, at least in the area of resource protectionism, a statutory scheme that is intended to be protectionist is not subject to "close scrutiny" absent a demonstration that interstate commerce *in fact* is being unevenly treated.

for out-of-state waste disposal, and there is nothing protectionist about Oregon's fee.

C. Oregon's Surcharge Is Cost-Based.

Unlike Alabama's surcharge imposed on hazardous waste imported into the State, Oregon's surcharge is required by statute to be based on Oregon's costs incurred in managing the disposal of that waste. Or. Rev. Stat. §§ 459.298; 459.297(2). In *Chemical Waste Management v. Hunt,* this Court specifically left open the question whether Alabama could have justified its out-of-state fee if it had been based on the costs to Alabama of its disposal, thus requiring out-of-state waste only to bear its "fair share" of the state's disposal costs. 112 S. Ct. at 2016 n.9. The Court did not explicitly indicate whether Alabama's surcharge would have been exempt from "close scrutiny" review if it had been based on the actual costs Alabama incurred in disposal of the out-of-state waste. Indeed, no Commerce Clause decisions appear to have faced this question. Three cases arising under the Privileges and Immunities Clause, however, suggest that a state's imposition of cost-based, disparate fees on non-residential use of in-state services or resources do not implicate the kinds of concerns that would merit this court's heightened scrutiny.

In *Toomer v. Witsell,* the Court rejected South Carolina's claim that its $2500 non-resident shrimp boat fee was justified when compared to the $25 fee imposed on residents. South Carolina had claimed that even though the disparate fee worked a virtual exclusion of non-residents from fishing in the 3-mile zone off the South Carolina coast, the fee was a legitimate effort by South Carolina to conserve its shrimp supply and "to head off an impending threat of excessive trawling." 334 U.S. at 397. The Court was unpersuaded that non-residents were "a peculiar source of the evil" at which South Carolina's conservation and excessive trawling purposes were aimed.

Significantly, however, the Court recognized that South Carolina was not without power under the Privileges and Immunities Clause

> to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay.

334 U.S. at 399 (emphasis added). *See also Mullaney v. Anderson,* 342 U.S. 415, 417 (1951) (states are "not without power" to impose higher non-resident fees if they "would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay"); *Baldwin v. Montana,* 436 U.S. at 404 (Brennan, J., dissenting) ("*Toomer* and *Mullaney* allow additional charges to be made on nonresidents based on both the added enforcement costs the presence of nonresident hunters imposes on Montana and the State's conservation expenditures supported by resident-borne taxes").

The Court's jurisprudence, in short, provides abundant support for the conclusion that Oregon's solid waste disposal funding scheme does not warrant close scrutiny under the Commerce Clause. Oregon does not patently discriminate against out-of-state waste because Oregon's fee system does not, on its face, demonstrate that in-state and out-of-state waste producers are required to pay disproportionate dollar amounts to support Oregon's solid waste management efforts. Oregon's surcharge on out-of-state waste is required to be based on the State's actual cost of the waste's in-state disposal; Oregon does not ask out-of-state waste to bear the brunt of the funding for Oregon's regulatory program. Oregon's fee structure is not protectionist in purpose or effect. But even if the fee does have some limited resource protectionist effect, it does not erect an "explicit barrier" to the entry of out-of-

state garbage. Finally, drawing from the "mutually reinforcing" values of the Privileges and Immunities Clause, cost-based but disparate non-resident fees for local services are not a federal concern at all. Oregon's funding scheme simply poses none of the evils associated with this Court's "close scrutiny" decisions.

IV. OREGON'S STATUTORY FUNDING SURVIVES CONSTITUTIONAL SCRUTINY BECAUSE THE BURDENS IMPOSED ON INTERSTATE COMMERCE ARE ONLY INCIDENTAL AND OREGON HAS AN UNQUESTIONABLY LEGITIMATE INTEREST IN RECOVERING THE COSTS OF IN-STATE DISPOSAL OF OUT-OF-STATE WASTE.

When the evils of economic protectionism and isolation are not present in a statutory regulatory scheme that otherwise does not patently discriminate against interstate commerce, this Court tests the scheme under the test articulated in *Pike v. Bruce Church* and applied in *Sporhase v. Nebraska*:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted).

Sporhase v. Nebraska, 458 U.S. at 954.

Oregon's statutory funding scheme easily satisfies this test. The safe and environmentally appropriate disposal of solid waste is of indisputable public importance and its regulation undoubtedly falls within the core arena of a

state's police power. Adequate funding obviously is crucial to the state's successful regulatory efforts. Oregon's funding scheme, because it legitimately seeks only to require non-resident waste producers to pay the costs attributable to in-state disposal, and because the costs of waste management are spread fairly among all waste producers, only incidentally burdens interstate commerce.

Thus, the only question left to address is whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." As discussed above, no hearing has been requested and no factual findings made as to the effect of Oregon's $1.40 per ton differential on the flow of interstate commerce. On this record, petitioners cannot argue that the fee recovers any more than out-of-state waste's fair share of costs incurred by Oregon or imposes an unreasonable burden on interstate commerce. The procedural course chosen by petitioners limited them to a facial challenge to the constitutionality of the statute and rules and there are thus no factual findings that would allow them to prove that the fee is "manifestly disproportionate" to the services rendered. *Clark v. Paul Gray Co.*, 306 U.S. 583, 599 (1939). Moreover, the cases are clear that the burden of proving that the fee is excessive is on the party challenging the fee. *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.*, 405 U.S. at 719-20; *Clark v. Paul Gray*, 306 U.S. at 600; *Ingals v. Morf*, 300 U.S. 290, 296 (1937).[19]

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[19] Two aspects of the Oregon fee limit the possibility that it can ever be applied abusively to out-of-state interests. First, since the fee is imposed only on waste dumped in Oregon, the event cannot be taxed by any other state. Thus, there is no danger of the multiple taxation by various states that has led to the Court to condemn some state taxes and fees. *Compare American Trucking Associations v. Scheiner*, 483 U.S. 266, 291-92 (1987) (noting danger of multiple taxation of interstate trucking; flat tax held invalid) *with Commonwealth Edison Co. v. Montana, supra* (coal severance tax upheld; no possibility of multiple taxation); and *Goldberg v.*

The benefits to Oregon of a funding mechanism that enables it to recapture all of its costs associated with in-state disposal of non-resident waste cannot be overstated. This Court's decisions repeatedly have recognized the benefit to a state in allowing the state to recover interstate commerce's "fair share" of the costs associated with interstate commerce's use of local services and resources. *See Commonwealth Edison,* 453 U.S. at 620; *Complete Auto Transit v. Brady,* 430 U.S. at 279; *Evansville-Vanderburgh Airport Authority District v. Delta Airlines,* 405 U.S. at 626-27. That is no less true in the case of a state's management of solid waste disposal. The need for adequate state funding is unquestioned. Although no hearing has been held and no factual findings have been made as to the amount of out-of-state waste brought into Oregon for disposal, it reasonably can be assumed that the amount is substantial. The amount of waste, and the added cost of its disposal, was sufficient to prompt the Oregon legislature to insist that non-residents pay the regulatory costs associated with disposing their waste in Oregon, thereby adding needed revenue to help distribute the costs of Oregon's solid waste management program among all who benefit from it.

That the non-resident fee Oregon seeks to collect relates to health and safety concerns adds force to the state's justification for requiring non-resident waste producers to pay their fair share of the costs of disposal in Oregon. Oregon is not "needlessly obstruct[ing] interstate trade or attempt[ing] to place itself in a position of economic isolation," and thus it "retains broad regulatory

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Sweet, 488 U.S. 252, 262-64 (1989) (telecommunications tax upheld; no significant risk of multiple taxation). Second, the Oregon fee is strictly limited by statute to the costs related to out-of-state waste. Thus, unlike some of the potentially open-ended sales, use, and other general taxes states impose, Oregon's fee is subject to its own internal limiting principle.

authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor,* 477 U.S. at 151. As with the State's efforts in *Sporhase v. Nebraska* to conserve ground water for public health and safety reasons, Oregon has strong justification for requiring non-resident waste producers to contribute their fair share to a regulatory program aimed at health and safety concerns.

Moreover, Oregon has legitimate reasons for structuring its in-state waste management funding scheme so that Oregon residents pay a portion of that cost through a dumping fee and the remainder through general income taxes. The Oregon legislature reasonably has decided that all Oregon residents should pay for in-state garbage disposal through income taxes, inasmuch as all Oregon residents, regardless of their individual contribution to the waste disposal problem, benefit from an efficient, healthful and effective waste disposal system. Even if Oregon could tax non-residents as a group to help fund Oregon's waste management program, it would not serve Oregon's legitimate interests to do so. The only non-residents who benefit from Oregon's regulatory program are those whose waste is brought into the State for disposal. But for those who live in Oregon or have sufficient contacts with the State to pay income taxes, the benefits that accrue broadly from Oregon's regulatory interests are both tangible and real. It makes sense—indeed, compelling sense—for the proportionate share of the costs of in-state waste disposal to be broadly distributed to Oregon taxpayers generally. Surely federal courts should not be in the position of second-guessing a State's allocation of in-state solid waste costs among in-state interests.

Oregon's interests underlying the funding structure it has adopted are legitimate and burden interstate commerce only indirectly, if at all. For these reasons, the structure does not violate the Commerce Clause.

V. OREGON'S SOLID WASTE DISPOSAL FUNDING STRUCTURE PASSES "CLOSE SCRUTINY" REVIEW.

A. Oregon Lacks Alternatives to Its Current Funding Structure That Are Adequate To Preserve Its Interests.

Petitioners claim that Oregon's solid waste disposal funding structure fails close scrutiny review because Oregon has non-discriminatory alternatives available to it. Oregon has no available alternative "*adequate* to preserve the local interests at stake," *Chemical Waste Management*, 112 S. Ct. at 2014 (emphasis added), if it is to recover the actual cost of in-state disposal of non-resident waste and retain its discretion to require that all Oregon residents, regardless of their individual contribution to the waste generation problem, contribute to funding the costs of maintaining an efficient, environmentally responsible solid waste management program.

Petitioners argue that Oregon should discontinue the use of general funds to defray a portion of the cost of managing the disposal of in-state garbage and increase the in-state fee to match the non-resident fee or, alternatively, reduce the non-resident fee to match the in-state fee. Petitioners' novel approach is not found in any of this Court's Commerce Clause or Privilege and Immunities Clause cases.[20] This Court has never held that a state

[20] In *Chemical Waste Management*, the Court suggested that non-discriminatory alternatives to the additional fee on out-of-state waste would be an equal fee on all waste, a per-mile tax on all trucks transporting waste on the roads, or an "evenhanded cap on the total tonnage landfilled." 112 S. Ct. at 2015. But these alternatives were based on and flowed directly from the Court's conclusion that Alabama's sole concern was reducing "the volume of the waste" entering the facility. *Ibid.* As the Court explicitly recognized, Alabama either could not or did not show that the fee on out-of-state waste was based on costs or that in-state interests, even though not subject to the fee, were nevertheless paying the appropriate costs of

could be required to change its funding mechanism to avoid "discrimination," at least where economic protectionism is not present. Oregon's funding, in effect, uses some general fund monies, collected from all taxpayers, to reduce the direct cost imposed on garbage producers. This Court's decisions do not prevent a state from using such funds solely for the benefit of state residents. *See Philadelphia v. New Jersey*, 437 U.S. at 637 n.6; *New Energy Co. v. Limbach*, 486 U.S. at 278.

Petitioners' "non-discriminatory" alternatives to Oregon's current funding system pose serious obstacles to Oregon's accomplishment of its goals. If the fee on in-state waste must be raised so that all costs of handling that waste are recovered through that fee alone, Oregon is precluded from spreading part of the cost of in-state solid waste among all of its residents and others who directly benefit from the state's waste management program, regardless of their individual contribution to the problem. Alternatively, if the fee on out-of-state waste were reduced to the level of the in-state fee (the approach petitioners undoubtdly would prefer), out-of-state waste would pay less than the costs of Oregon's regulatory program that are attributable to the disposal of that waste within Oregon's borders. In effect, Oregon taxpayers would be forced to subsidize out-of-state waste disposal. Clearly, that result is not constitutionally required; interstate commerce can be made to pay its own way. *See, e.g., Commonwealth Edison*, 453 U.S. at 623-24.

The impact of raising the in-state garbage fee to $2.25 per ton, which would cure any Commerce Clause problem

the state's solid waste regulatory programs. 112 S. Ct. at 2016 and n.9. The fee on out-of-state waste in that case was, in fact, blatantly discriminatory, unrelated to cost, and imposed in order to make out-of-state waste bear the entire burden of the state's goal of reducing volume. In contrast, Oregon's fee is based only on the cost of disposing of out-of-state waste, requires out-of-state waste to pay only its fair share, and is balanced by fees and taxes the state imposes on in-state waste and state residents.

(see OWS Br. 19-20), further underscores the superficial nature of petitioner's claim that Oregon's $1.40 per-ton surcharge burdens interstate commerce. An increase in the in-state waste disposal fee would have absolutely no impact on the free-flow of out-of-state garbage into Oregon landfills. *Cf.* OWS Br. 22 ("[T]he purpose of the Commerce Clause [is] to ensure the free flow of interstate trade.") The cost imposed on out-of-state waste would be exactly the same as it is now. Then, as now, out-of-state waste would be welcome in Oregon. There would be no change in the cost advantages or disadvantages of Oregon landfills compared to those of other States as a final resting place for out-of-state garbage. Necessarily, then, it is the fact of the surcharge, not the differential, that creates whatever incidental burden rests on interstate commerce. But *the fact* of the surcharge, standing alone, implicates no interest with which the Commerce Clause is concerned.

Significantly, the Court's examination of possible alternatives to a discriminatory fee on interstate commerce focuses on the availability of alternatives "adequate to preserve the local interests at stake." *Chemical Waste Management v. Hunt,* 112 S.Ct. at 2014. Nondiscriminatory alternatives are almost always available; the question is whether they are adequate. As explained above, the "nondiscriminatory" alternatives available here—lowering the out-of-state fee or raising the in-state fee—are inadequate. Oregon's allocation of in-state costs legitimately promotes its state regulatory policy; petitioners' suggested non-discriminatory alternatives do not. In short, applying the Commerce Clause test, no "nondiscriminatory" alternative to Oregon's current funding approach adequately preserves Oregon's interests.

Moreover, in the three Privileges and Immunities Clause cases addressing disparate non-resident fees discusesd earlier (*ante,* pp. 30-31), this Court did not so much as hint that a disparate non-resident fee that a state sought to justify based on a general fund subsidy of the in-state fee would fail the less restrictive alternative requirement on the basis that the state always had the option of increasing the in-state fee to match the non-resident fee. Indeed, in all of those cases, the Court intimated that disparate fees clearly would satisfy the constitutional test if the in-state fee were lower because general fund revenues subsidized in-state costs.

Finally, this case presents a particularly compelling example of a state policy choice that should not be lightly struck down. State flexibility in structuring the financing of in-state waste reduction and disposal costs is consistent with federal law. This court has recognized that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." *Philadelphia v. New Jersey,* 437 U.S. at 620 n.4, *quoting* 42 U.S.C. Section 6901(a)(4) (1976 ed.). It would be strange indeed to deprive the states of discretion in determining how to meet this congressional mandate on the basis of an amorphous and unsubstantiated claim of harm to interstate commerce. Moreover, since this case concerns "dormant" commerce clause matters, any widespread abuses by the states could be remedied by federal legislation. *See Prudential Ins. Co. v. Benjamin,* 328 U.S. 408 (1946).

B. Out-of-State Interests Properly Can Be Made To Pay Their Fair Share of a State's Costs Where Goods in Direct Competition Are Not Involved and Interstate Commerce Is Not Asked To Bear the Brunt of Oregon's Regulatory Efforts.

Petitioners argue that Oregon cannot justify its disparate in-state and out-of-state garbage disposal fees by asserting that "intrastate commerce pays its "fair share of the relevant costs through general revenue measures." *See, e.g.,* OWS Br. 23-26. Petitioners rely on compensatory tax cases, such as *Maryland v. Louisiana,* 451 U.S. 725 (1981), where the Court has required that taxes or

fees be (1) imposed on individual in-state and out-of-state products or entities in equivalent amounts and (2) based on substantially equivalent events. In the compensatory tax area, this Court has sought to ensure that when interstate products or businesses compete with local products or businesses, the comparative dollar amounts of taxes or fees do not result in a competitive advantage for in-state products. Thus, a State with a sales tax may impose a non-discriminatory use tax on goods purchased out-of-state and used in the state in order to preserve revenues and prevent diversion of purchases. But a discriminatory use tax that, in effect, gives an advantage to local business violates the Commerce Clause for the same reason any other economic protectionist measure does. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) (non-discriminatory use tax upheld); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963) (discriminatory use tax held invalid).[21]

Petitioners' reliance on compensatory tax cases is misplaced. When resource conservation, as opposed to economic competition, is at issue the fair share focus is different. The Commerce Clause concern here is not direct competition in the sale of goods, but whether a state requires out-of-state users of the resource to bear the brunt of supporting local conservation efforts or erects barriers to the use of the resource. Thus, a State's efforts to protect a state resource by closing its borders to interstate commerce are generally invalid, *see, e.g., Hughes v. Oklahoma*, 441 U.S. 322 (1979) (ban on export of minnows); *Philadelphia v. New Jersey, supra.* On the other hand, a State's efforts to spread the burden to in-state and out-of-state interests alike do not violate the Commerce Clause. *See, e.g., Sporhase v. Nebraska, supra.*

[21] Petitioners also rely on *American Trucking Assn. v. Scheiner*, 483 U.S. 266 (1987) for the proposition that a higher fee imposed on interstate commerce cannot be justified by other taxes paid by in-state interests. OWS Br. 24. But in *Scheiner*, the Court found that the flat tax on motor vehicles in fact discriminated against out-of-state vehicles "by subjecting them to much higher charges per mile traveled in the state," and did "not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads" by out-of-state vehicles. 483 U.S. at 290.

A state cannot then finance local conservation efforts on the backs of out-of-state users, but it may ask them to contribute their fair share. That share is the additional cost to the state that the out-of-state resident's use of the local resource causes the state to incur. The focus in the resource use context is not on the extent of the burden imposed on each individual in-state user of the resource, and whether that burden matches the individual out-of-state user's burden. *See Sporhase v. Nebraska*, 458 U.S. at 955-56. Rather, it is on whether the state's collective contribution to protecting or preserving the resource, however that contribution is drawn from in-state interests, is adequate to fund the State's proportionate share of the cost of conservation.

This Court's cases teach, then, that where resource conservation is at issue, the focus is two-fold: (1) whether the state imposes sufficient costs and burdens on in-state interests to achieve the conservation benefits that are provided to state residents; (2) whether the amount of the out-of-state user's contribution is based on the additional cost imposed on the state in allowing the out-of-state user to avail itself of the in-state resource.

Oregon, through a combination of in-state user fees and general fund revenues, pays the full regulatory disposal costs for garbage produced and disposed of in-state. The out-of-state fee is based on the additional cost which the state incurs by out-of-state waste's disposal in Oregon. By virtue of the express nexus to actual costs, Oregon necessarily asks only that out-of-state waste bear its proportionate share of the costs of using Oregon's landfills. The Commerce Clause does not require Oregon to accept less. Accordingly, even if this Court concludes that "close

scrutiny" is appropriate in analyzing Oregon's solid waste funding scheme, that scheme meets the challenge that test imposes.

VI. TO THE EXTENT PETITIONERS CONCEDE THAT A COST-BASED SURCHARGE MAY IN SOME CIRCUMSTANCES BE PERMISSIBLE, AND THEY INSTEAD ATTACK ONLY ASPECTS OF OREGON'S FEE, THE COURT'S REVIEW SHOULD GO NO FURTHER.

Having vigorously contended that Oregon's cost-based fee, on its face, violates the Commerce Clause, petitioners —sometimes abruptly and sometimes subtly—shift course and embellish their challenge with detailed "factual" arguments about the components of the fee and its impact. *E.g.*, OWS Br. 26-31; CRC Br. 23-34. Petitioners evidently seek to transform their claim, if necessary, into an "as applied" challenge. They argue that certain of the regulatory expenses Oregon recovers with the fee are outside the scope of what the Commerce Clause permits, and that in fact Oregon's surcharge is protectionist in purpose and effect. They thus implicitly retreat from their position that *any* cost-based fee greater than the fee on in-state waste is *per se* invalid, and their arguments at that point become fact-bound. Specifically, petitioners attempt to assert that in fact Oregon's fee restricts the flow of waste across Oregon's borders, and that in purpose and effect it benefits in-state interests by preserving Oregon landfill capacity for Oregonians. Petitioners also factually attempt to dissect Oregon's fee, its various components, the justifications for it, and the manner in which it recoups regulatory expenses that, petitioners believe, are not among the costs a State should be permited to collect. Petitioners' belated claims need not and should not detain the Court. Petitioners have waived these arguments, both by the procedural route they took through state court, and by the arguments they abandoned and failed to raise along the way.

A. Petitioners Have Abandoned Any Claim That the Surcharge in Fact Is Protectionist in Purpose or Effect.

Petitioners proceeded through the state courts on the simple (and simplistic) theory that any facial disparity in the fee rendered it *per se* subject to strict scrutiny and that no inquiry into the effect of the fee was permitted, much less required. Now, however, petitioners spice their arguments with a wide array of fact-based assertions about the "protectionist" effect of Oregon's surcharge.[22] They do so after having disclaimed below, unequivocally, that any inquiry into the actual effect of Oregon's fee on out-of-state commerce is foreclosed by this Court's jurisprudence, which petitioners argued, treats any facially disparate treatment of in-state and out-of-state waste as "discriminatory," thus requiring strict scrutiny.[23] The proce-

[22] The most flagrantly fact-based of the assertions are contained in CRC's brief, which argues, for example, that: Oregon is giving its citizens a "misconceived priority over the State's landfill capacity" (CRC Br. 15); Oregon is engaged in economic protectionism because the fee "has the effect of saddling those outside Oregon with a disproportionate burden of conserving Oregon's landfill capacity" (CRC Br. 16); the purpose of Oregon's surcharge "is the preservation of landfill capacity for Oregonians," and it will "plainly have that effect" (CRC Br. 16). OWS is more subtle in trying to suggest the same problems: "intrastate waste is exempt from the burden [placed on the disposal of out-of-state waste]" and thus in-state waste does not have to "compensat[e] the State for *all* of the costs associated with waste disposal" (OWS Br. 20); the fact that in-state waste generators do not absorb a fee placed on out-of-state generators "means, necessarily, that in-state generators will have an economic advantage in competing for Oregon waste disposal capacity " (OWS Br. 23).

[23] That basic theme permeated OWS's briefing throughout the state court proceeding. OWS relegated to a footnote its response to the State's arguments on the importance of a showing of actual impact on interstate commerce interests. *E.g.*, OWS Pet. for Or. Sup. Review, 11-12, n.3. CRC never briefed the federal Commerce Clause issues independently in the state courts; rather, it always

dural route of review petitioners invoked required the rule to be considered in isolation. That narrow procedure was consistent with petitioners' theory and with their strategy, for petitioners sought not only to deny the relevance of an inquiry into the relative burdens and costs on in-state and out-of-state interests, but also to deprive the State of the opportunity to defend its rule on the basis that there was no discriminatory impact on interstate interests *in fact*.[24]

If, as the State consistently has argued, the relative burdens on in-state and out-of-state commerce must be realistically examined to determine whether a disparate *cost-based* fee on out-of-state waste disposal is "discriminatory," then petitioners are foreclosed from their fact-based assertions that the rule has an actual protectionist effect. Those are new claims that were not raised below, were not within the state courts' power to examine, and cannot be examined on the record before the Court. Petitioners, having chosen a narrow path of review and having disclaimed that anything more than the face of the rule should be examined, are in no position to complain if the examination stops there.

"adopted and incorporated" OWS's position. Ironically, it is CRC that now presses fact-based protectionist arguments particularly beyond anything ever argued in the lower courts.

[24] As discussed earlier, petitioner CRC brazenly asserts that "the limited form of judicial review authorized by Oregon's Administrative Procedures Act disabled, in large part, the State from factually justifying its discriminatory treatment of foreign waste." CRC Br. 13-14. The State, in its response to the petitions for certiorari, pointed out the limitations of the procedure below and the ways in which they might render review in this case less merited. Resp. in Opp. to Cert. 3-5, 8-14. Petitioner OWS accused the State of trying to run a "squeeze play" which would hamper them in their efforts to achieve a full adjudication of their claims. OWS Reply to Resp. in Opp. to Cert. 2. If a "squeeze play" is at work, petitioners, not the State, executed it.

B. Petitioners Have Waived Their Fact-Based Challenges to the Components of the Fee.

In similar fashion, petitioners now press challenges to certain of the components of Oregon's cost-based fee, in addition to facially attacking the fee as a whole. Only two of their challenges were presented below. Specifically, petitioner OWS argued that to include "lost disposal capacity" and pollution tax credits in the fee violated the Commerce Clause.[25] The Oregon Court of Appeals rejected those arguments, holding that they were not within the scope of the court's review. *Gilliam County v. Dept. of Environmental Quality*, OWS Pet. Cert. App. 25a n.6. None of the other challenges to the components of the fee that petitioners now make were raised below. Of equal significance, when petitioners sought review in the Oregon Supreme Court, they abandoned altogether their few challenges to the calculation of the costs.[26]

Petitioners largely disregard the posture in which they find themselves. At this juncture, either their claims cannot be resolved in this proceeding (as the Oregon Court of Appeals concluded), or they have been abandoned, or both. It is fundamental that petitioners cannot come before this Court making new challenges that they never presented in any form to either lower state court, nor is it obvious why they believe they are entitled to by-pass the Oregon Supreme Court altogether with the limited

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[25] OWS Opening Br. (Oregon Court of Appeals) 31-34. CRC adopted and incorporated those arguments by reference, as it did with all of OWS's federal arguments. CRC Opening Br. (Oregon Court of Appeals) 13.

[26] *See generally* OWS Pet. for Sup. Ct. Rev. Again, CRC did not make any independent federal law arguments, but merely adopted and incorporated all of OWS's arguments. Thus, neither petition raised any concern about the calculation of the costs or the manner in which the Oregon Court of Appeals had resolved the two claims on that point that OWS raised.

claims that they half-heartedly pressed in the Oregon Court of Appeals.[27]

C. The Record Before the Court Provides an Inadequate Basis To Test the State's Calculation of Its Surcharge.

Petitioner CRC ignores the problem created by petitioners' failure properly to present and preserve their challenges to the State's calculation of the costs. Petitioner OWS glosses over the problem, apparently willing to concede as a state law matter that their challenges to the actual calculation of the fee could not be reached below, but asserting cavalierly that the fact that the state courts did not feel free to examine the record and resolve these claims "of course" does not bar this Court from doing so. OWS Br. 26.[28] The notion that this Court will so readily disregard state jurisdictional and procedural limitations is novel at best; the Court more frequently accords state processes considerable deference and respect.[29] Even assuming the Court would not be bound by the limits on the state courts' review, what petitioner

[27] *See generally Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (explaining reasons for requirement that federal question be properly raised in state court proceedings).

[28] It is worth repeating that the Oregon Supreme Court did not even have the opportunity to consider whether, as petitioner OWS asserts, "state procedural rules * * * barred the Oregon Supreme Court" (OWS Br. 26) from reaching these arguments, since OWS did not show the state's highest court the courtesy of asking it to consider those claims.

[29] Federal questions generally must be pursued in state courts through the procedures and with the degree of specificity required by state rules of practice. *See Beck v. Washington*, 369 U.S. 541, 549-54 (1962). "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John v. Paullin*, 231 U.S. 583, 585 (1913).

OWS ignores is that the record was not constructed for purposes of substantively testing DEQ's rule, and it does not contain the evidence that the State would be entitled to present if petitioners sought through any other state or federal forum to deconstruct the fee.

To be sure, the record here contains many documents that tend to demonstrate, at least partially, the basis on which DEQ selected the particular cost figure it adopted by rule. But nothing in Oregon's administrative procedures act requires that the record placed before the Oregon Court of Appeals be a complete showing of what the agency did and why. As already discussed, the documentation contained in the record is a compilation of what the agency made available to the public to provide an opportunity for public hearing and comment. This documentation is "the record" on review only for purposes of showing *procedural* compliance with rulemaking requirements. After public hearings on a rule, an Oregon agency may dramatically alter its proposed rule with no further public hearing and no further documentation that would become part of the record submitted to the Court of Appeals in a rule challenge proceeding under Or. Rev. Stat. § 183.400. Similarly, following the public hearing, an Oregon agency may reexamine the proposed rule and, for reasons not a matter of record, may conclude that the substance of the rule should remain the same. Procedurally, nothing in Oregon law precludes post-hearing deliberations as part of the process of adopting administrative rules. Necessarily, then, the record that comes before the Oregon Court of Appeals to show *procedural* compliance with rulemaking requirements is by definition an inadequate basis to examine the substantive validity of the rule, for it does not contain documentation of anything the agency considered in its internal deliberations after the close of the public hearing. It is for that reason that the Court of Appeals is foreclosed statutorily from examining whether there is "substantial evidence" to support the agency's rule, or from making any other examination of substantive validity that goes beyond the rule's face.

No record yet exists from which that examination reliably can be made. *See also* n.6, *ante*.

Other forums and procedures therefore must be invoked. A challenge to the substance of a rule may be brought in Oregon circuit court, which permits a full evidentiary hearing and which would result in fact-finding by a state trial court. Similarly, a federal court suit would permit petitioners to wage a direct attack on the manner in which Oregon has calculated the fee on the theory that some of the components cannot constitutionally be included. Indeed, petitioners have already brought state and federal court lawsuits in which their claims can be raised and litigated.[30] They have suggested no reason why the limited record before the Court—which is documentary only, and does not contain a full presentation of evidence, testimony and cross-examination of witnesses, or other features of a traditional *adjudicatory* proceeding—should be deemed a fair or adequate basis on which to test DEQ's calculation of Oregon's fee. Nor have petitioners given any sound reason why this Court should engage in *de novo* review of the limited record before it and place itself in the position of making factual findings in the first instance.[31] If petitioners wish to base their case on assertions that some components of Oregon's surcharge do not represent true "costs" (OWS Br. 28-29; CRC Br. 23-26) or that the fee discriminates in effect because in-

[30] *See* Resp. Br. in Opp. 14, n.11 discussing the state and federal court lawsuits petitioners have pending.

[31] As petitioners reluctantly concede (OWS Br. 26, n.11), at most, the case should be remanded to the Oregon Supreme Court so that a state court may review the record in the first instance. Of course, to do so would plainly ride roughshod over the Oregon legislature's limited grant of jurisdiction to the Oregon appellate courts and the probable reluctance the state courts will have in engaging in fact-finding based on a record ill-suited to the inquiry. It is difficult to understand why this Court should accept either of petitioners' invitations (to engage in fact-finding, or to coerce the state courts into doing so) when they can and have filed other lawsuits in which their challenges can be resolved.

state waste does not "pay" the same "costs" (OWS Br. 28-30; CRC Br. 31-34), they must allege and prove those facts before an appropriate factfinder in a forum adequate to address them.[32] Their effort to make those arguments at this late hour, and in the context of this narrow proceeding, should be rejected.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

THEODORE R. KULONGOSKI
Attorney General of Oregon

THOMAS A. BALMER
Deputy Attorney General

VIRGINIA L. LINDER *
Solicitor General

MICHAEL D. REYNOLDS
Assistant Solicitor General
400 Justice Building
Salem, Oregon 97310
(503) 378-4402
Counsel for Respondents

* Counsel of Record

[32] Although the record is not adequate to resolve petitioners' attacks, it does demonstrate the fact-intensive nature of the issues and the need for a full evidentiary hearing and fact-finding. For example, petitioners assail the "environmental liability" component of the fee, arguing that such liability "is not a certainty," so no cost for it can be recovered. CRC Br. 25. Any buyer of insurance—or any self-insurer—knows that potential liabilities impose costs, even if they are difficult to measure. Many of petitioners' objections are similar, and reflect a crabbed view of "costs" that finds no support in the law, in economic theory, or in sound policies of waste management. *See generally* Coase, "The Problem of Social Cost," 3 J.L. & Econ. 1, 44 (1960) ("The cost of exercising a right (of using a factor of production) is always the loss which is suffered elsewhere in consequence of the exercise of that right—the inability to cross land, to park a car, to build a house, to enjoy a view, to have peace and quiet or to breathe clean air.").